IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 387 of 1999
with
CRIMINAL APPEAL No 819 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABUBHAI DALAJI MALI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 387 of 1999
MR BB NAIK WITH MEHUL H RATHOD for Petitioner No. 1
MR ND GOHIL Ld. APP for Respondent No. 1

2. Criminal Appeal No. 819 of 2000
MR PM VYAS for Petitioner No. 1
MR ND GOHIL Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and

MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 31/07/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

1. These two appeals under section 374 (2) of Criminal Procedure Code have been directed against the judgment & order dated 22-3-1999 rendered in Special Case No. 73 of 1998 by Learned Addl. Sessions Judge, District Banaskantha at Palanpur, convicting the Bhairavji Manaji Mali (original accused No.1 and appellant in Criminal Appeal No. 819 of 2000); AND Babubhai Dalaji Mali (original accused No.2 and appellant in Criminal Appeal No. 387 of 1999) for the offence under section 18 and section 29 respectively of Narcotic Drugs & Psychotropic Substance Act (herein after referred to the'Act'); AND sentenced both the appellants-accused to suffer 10 years R.I. and fine of Rs. One lakh, and in default 2 years S.I. It is this conviction and sentence under section 18 and 29 of the Act which have been assailed by both the accused by the present appeals.

2. The prosecution case shortly stated is that, on 23-6-1998 at 2-10 A.M. an information was received by Palanpur LCB P.I., A.D. Chauhan at his residence to the effect that, at about 6.00 A.M. in the morning on the road leading from Bhildi to Deesa near Bhildi Railway Crossing, two persons (1) Bhairavji Manaji Mali and (2) Babubhai Dalaji Mali are to come for giving delivery of narcotic substance i.e. opium. P.I. Chauhan came to the police station and called the other police persons and appraised them of the information received, and also told them that, they have to go for the raid; that the information received was reduced into writing on a paper, the same was noted down in the Station Diary and through a confidential letter same was conveyed to the superior official; that PSI S.K. Trivedi and police constable Narsibhai Devabhai of Bhildi Police Station were also called and appraised of the information received; thereafter at about 3.30 O' clock, P.I. Chauhan along with other police persons left the LCB office and reached Bhildi railway crossing at about 4.30 hours; that two panchas Bhikaji Kaluji Thakore and Mafaji Kuvarji Thakore were called through police constable Narsibhai and they were also appraised of the information received; that the vehicles were concealed behind the bushes and panchas and the members of the raiding party remained in watch. In the meantime at about 6.00 a.m. two persons came walking from Bhildi side. One person was holding heavy cotton

bag; that, after crossing the railway crossing they were standing on the side of the road towards Deesa. At that time the person holding the cotton bag handed over the cotton bag to the other person who was with him and went to answer call of nature and after returning, he took back the cotton bag which was given to the other person; that both of them were talking with each other. In the meantime both of them were cordoned. On asking one of them gave his name as Bhairavji Manaji Mali and the other person gave his name as Babubhai Dalaji Mali. The indentity of panchas and police persons were also given to them and they were told whether they wanted to take search of the panchas and police persons, to which they declined. They were also told that inquiry is to be made for their possessing narcotic substance opium, and whether they want themselves to be searched through a gazetted officer or Magistrate, to which both of them declined; that the police persons and panchas took search of each other but nothing objectionable was found; that thereafter personal search of accused No.1 Bhairavji Manaji Mali was taken and during the search the cotton bag which he was holding was opened from which one plastic bag was found and on opening the plastic bag, black substance liquid was found and the same smelt like opium. Both the accused persons were asked whether they were possessing any license, permit or authorisation for keeping opium, to which both of them replied in the negative; that thereafter from Bhildi village one trader Kanji Laxmanbhai Joshi was called with scale / weights & measures for weighing the opium; that nothing was found on the person; that Kanjibahi weighed the substance recovered from the accused and the same weighed 1950 grams valuing Rs.48,750/-, from which two samples of 50 grams each were separated and packed separately in a cotton bag and then remaining opium was put in the plastic bag which was tied with the thread and again put in the plastic bag from which it was discovered. The plastic bag was put in the cotton bag with the remaining opium and two samples were packed and sealed with the slip containing signature of the panchas and P.I. with seal of P.I., LCB- BK. Palanpur. A detailed panchnama was drawn for recovery of opium and taking of the samples, the accused were thereafter arrested; that the complaint was filed with Bhildi police station, the offence was registered and thereafter the investigation commenced; that on completion of the investigation chargesheet was filed against both the accused persons for offence under section 18 and 29 of the Act.

3. Charge was framed against the accused persons. Accused denied the charges levelled against them and

claimed to be tried. The prosecution in order to bring home the guilt to the accused adduced oral as well as documentary evidence. Learned trial judge appreciating the evidence on record found accused No.1 Bhairavji Manaji Mali guilty for the offence under section 18 of the Act, whereas found accused no.2 Babu Dalaji Mali guilty for the offence under section 29 of the Act, and sentenced both the accused persons to suffer R.I. for ten years and fine of Rs. One lakh, in default, S.I. for two years. It is this conviction & sentence by the trial court which have been assailed by both the accused persons by the present appeals as pointed out above.

4. We have heard the submissions advanced by Mr. B.B. Naik, learned advocate for the appellant - original accused No.2 in Criminal Appeal No. 387 of 1999 and Mr. P.M. Vyas, learned advocate for the appellant - original accused No.1 in Criminal Appeal No. 819 of 2000, and also the submissions advanced by Mr. N.D. Gohil, Learned Addl. Public Prosecutor in both these appeals. We have also reappreciated the evidence adduced in the trial court.

5. One of the arguments advanced on behalf of the appellants is that, in the instant case Section 42 of the Act would be applicable and that, there is no compliance with the mandatory requirements of Section 42 (2) of the Act. It is further contended that, when the police officer acts on the prior information then the said information is required to be reduced into writing and communicated to the superior officer, irrespective of whether search & seizure is to be in a public place or otherwise. As against this, it is submitted by Mr. N.D. Gohil, learned APP that, in the instant case section 43 of the Act would be applicable and not the provisions of section 42 of the Act, in as much as the contraband opium is recovered from the accused persons in a public place, namely a public road.

6. It is the prosecution case that on 23-6-1998 at about 2.10 a.m. (night) an information was received by Palanpur LCB P.I. Chauhan (P.W-9) at his residence to the effect that at about 6.00 0' clock on the road from Bhildi to Deesa at Bhildi railway crossing two persons Bhairavji Manaji Mali and Babubhai Dalaji Mali are coming for delivering opium. According to the prosecution, P.W-9 came to the police station and reduced the said information into writing vide exhibit-27, which translated into English reads as follows :-

" Palanpur

Date: 23-6-98
Time: 2/30

Today on 23-6-98 I was present at my residence in the Police Headquarters. At that time informant gave an information that today in the early morning around 6.00 0' clock on the road from Bhildi to Deesa near Bhildi railway crossing two persons (1) Bhairavji Manaji Mali and (2) Babu Dalaji Mali are to come for giving delivery of intoxicant substance opium. Said information has been reduced into writing. The name of the informant is not mentioned for secrecy purpose.

On the basis of the said information arrangements were made for going in raid/cordoning. "

It will be seen from the above information exh. 27 that two accused persons named therein were to come on Bhildi - Deesa road near Bhildi railway crossing. According to the prosecution, contraband opium was recovered from the cotton bag which accused no.1 was holding, and accused no.2 came along with accused no.1 and had held the cotton bag for some time to enable accused no.1 to answer the call of nature. Thus the information exh. 27 pertained to a public place, namely on Bhildi-Deesa road near Bhildi railway crossing and the recovery also at the aforesaid place.

7. Section 43 of the Act deals with power of seizure and arrest in public place - provides that any officer of any of the departments mentioned in section 42 may--

(a) Seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. "

8. Section 42 deals with Power of entry, search, seizure and arrest without warrant or authorisation - Sub section (1) thereof reads as follows :-

(1) "Sub section (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) .....
(b) .....
(c) .....
(d) .....

9. In the case of STATE OF PUBJAB Vs. BALBIRSINGH, AIR 1994 S.C. pg. 1872, the Apex Court was dealing with a case of arrest & search of a person or search of a place conforming to the provisions of the Act. In para-9 it has been observed that, "but if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the Officer empowered have to proceed and act under the provisions of Ss. 41 and 42..."

In para-10 it has been observed that, "...The Magistrate or Officers especially empowered under the Act can proceed under Ss. 41 and 42 on the prior information and/or having reason to believe thereupon that an offence under the Act has been committed. We may mention here that S. 43 which deals with the power of seizure and arrest in public places is slightly different from S.42 in certain respects. Under the provision any empowered officer under S. 42 has the power to seize, detain, search or arrest in public place or in transit if he has reason to believe that an offence punishable under Chapter IV relating to such drug or substance has been committed and seize any document or other article which may furnish evidence of the commission of such offence..... The empowered officer while acting under S. 43 need not record any reasons of his belief. This Section also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to S. 42."

In para-16 it has been observed " the object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to S. 42(1). "

10. In the case of ABDUL RASHID IBRAHIM MANSURI Vs. STATE OF GUJARAT, AIR 2000, S.C. pg. 821, PW-2 Premsingh M Vishen, Inspector of Police at Dariapur police station, got information on 12-1-1988 that one Iqbal Syed Husen was trying to transport Charas to Shahpur in an auto-rickshaw bearing No. GTH-3003. Thereafter PW-2 proceeded to the main road in quest for the contraband movement. At about 4.00 p.m. they sighted the auto-rickshaw which was then driven by the appellant. They stopped it and checked it and found four gunny bags placed inside the vehicle..... In para-14 it has been observed that, "in this case PW-2 admitted that he proceeded to the spot only on getting the information that somebody was trying to transport narcotic substance..... However, learned counsel for the respondent - State of Gujarat - contended that the action was taken by him not under Section 42 of the Act but it

was under Section 43 as per which he was not obliged to take down the information." The Apex Court observed that, "it was unable to appreciate the argument because, in this case PW-2 admitted that he proceeded to the spot only on getting the information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence PW-2 cannot wriggle out of the conditions stipulated in the said sub section. We, therefore, unhesitatingly hold that there was noncompliance with Section 42 of the Act. "

In the case of KOLUTTUMOTTIL RAZAK Vs. STATE OF KERALA, 2000 SCC (Cri) pg. 829, the PW a Sub-Inspector of Police got information on 31-3-1991 that one man was selling brown sugar near Sarada Mandir bus stop. PW-1 admitted in his cross-examination that he did not reduce the information into writing nor did he inform his superior officer about it and instead he opted to proceed to the place without doing the aforesaid duty. In para-6 it has been observed that." it is a mandate of Section 42 of the Act that when an officer referred to in sub-section (1) thereof "has reason to believe from personal knowledge or information given by any person and taken down in writing (emphasis supplied) that any narcotic drug or psychotropic substance is kept or concealed he may detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence under the Act. The other requirement of law is that the officer who takes down the information in writing or records grounds for his belief shall forthwith send a copy thereof to his immediate superior official."

In the case of BECKODAN ABDUL REHIMAN Vs. STATE OF KERALA, (2002) 4 SCC 229, the Inspector of Police received telephonic message on 6-10-1990 at about 8.30 a.m. that narcotic drugs were being sold at T.C. Junction and he acted on the said telephonic information and on reaching T.C. Junction found that inside the fold of dhoti, which the appellant was wearing, opium had been concealed in a polythene bag. In para-6 the Apex Court has held that in absence of compliance with the mandatory provisions contained in Section 42(2) and Section 50, conviction of the accused appellant is liable to be set aside.

In the case of HIMMAT PETHABHAI VANKAR Vs. STATE OF GUJARAT, 1996(2) GLR pg. 832, the Division Bench while dealing with the case of search made in public place in light of the provisions contained in Section 42 & 43 of the Act, held that, Section 43 and not Section 42

would be attracted and the officer is not required in such cases to reduce the information in writing and send copy thereof to his superior. It cannot be said even for a moment that when an empowered officer acting without prior information under section 43 of the Act the provisions of Section 42 will be attracted. In the case before the Division Bench, PSI with other staff members was petrolling in Bhulabhai Park area, Ahmedabad on 22-1-1989 and at 14-00 hrs. when he reached near Karnavati Chowk, the informant informed him that one person was to pass riding over a scooter with narcotic drug, viz. charas or ganja. Hence he called panchas and deployed the panchas as well as the members of the staff at different places. Thus it was a case of receipt of sudden/ abrupt information while on petrolling duty about the commission of offence under the Act and not a case of empowered officer acting on prior information. In our opinion Himmat Pethabhai Vankar (supra) is not applicable to the facts of the present case.

Thus when the police officer acts on prior information as regards the commission of offence under the Act in a public place, then, the requirement of Section 42(2) has to be complied with, as the information received would fall within the purview of section 42 (2) of the Act.

The ratio of all the above judgments is, when the appointed/ empowered officer acts on prior information, then, irrespective of the fact whether the search & seizure is to be carried out in a public place or not, the information received is required to be reduced in to writing and communication of the same to the superior official as required in Section 42(2) of the Act.

11. Mr. N.D. Gohil, learned APP inorder to show applicability of Section 43 of the Act as the contraband opium recovered is from a public place, namely on a road from Bhildi to Deesa, near Bhildi railway crossing, has placed reliance on the decision in the case of NARAYANASWAMY RAVISHANKAR Vs. ASSTT. DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE, (2002) 8 SCC Pg. 7, 5940 gm of heroin concealed in the bottom of a suit case was recovered when the accused was attempting to transport the same from International Airport, Chennai to Singapore. In this case the Apex Court while dealing with the question of applicability of Section 42 of the Act when the search & seizure was conducted in a public place viz. Airport, held that, it is Section 43 of the Act which is applicable and not Section 42 and hence the question of noncompliance, if any, of the provisions of

Section 42 of the Act was wholly irrelevant. Thus in the routine checking the contraband heroin was seized and recovered at the Airport by the concerned authority. This was not a case of acting on prior information. The principle enuntiated in Narayanaswamy Ravishankar (supra) is not attracted to the present case.

Mr. Gohil has also placed reliance on the decision rendered in Criminal Appeal No. 12 of 2000 by the Division Bench of this High Court in the case of RAGHUBHAI GANDABHAI BHARWAD Vs. STATE OF GUJARAT, and contended that in the instant case as the search & seizure has been in a public place, namely near Bhildi railway crossing on Bhildi - Deesa road, Section 42 of the Act will not be applicable, but Section 43 of the Act is attracted. In the case of Raghubhai Gandabhai Bharwad (supra) the appellant was found in possession of opium while he was passing on a public road. The empowered officer was informed by an informant that one Raghubhai Bharwad was to pass through Thaltej cross roads on June 10, 2001 between 13.00 - 14.30 hrs and was to come from Sarkhej side for going towards Ghatlodia. According to the prosecution, on receiving this information police constable Himatsinh Lalubha Gohil had conveyed the information to Mr. R.C. Pathak, who was then Police Inspector of Crime Branch. Thereafter panchas were called, necessary entry was also made in the Station Diary maintained in the police station and informed the higher officers about the information received.

Referring to the case of Koluttumottil Razak (supra), the Division Bench in para-10 (2) observed that the Sub Inspector of Police had got information that one man was selling brown sugar near Sarada Mandiram Bus-stop and the Sub Inspector admitted in his cross examination that he had not reduced the information in writing nor had informed his superior officer about it and instead he had opted to proceed to the place without doing the aforesaid duty. After referring to the decision in the case of Abdul Rashid Ibrahim Mansuri (supra), the Division Bench observed, " we find that the question whether the provisions of section 42(2) would also apply when an offending article is found from a public place, is not specifically considered by the Supreme Court, but the Supreme Court has given the decision on the assumption that section 42(2) would also apply when an offending article is found from a public place. The said observations made by the Supreme Court cannot be treated as a binding precedent, as the question which is posed for our consideration in this appeal, was never canvassed before the Supreme Court, nor the Supreme Court had

addressed itself to the said question. "

In para- 10(3) the Division Bench observed, " in view of the above mentioned two decisions of the Supreme Court, the decision of the Supreme Court in Koluttumottil Razak (supra) cannot be construed as laying down a proposition of law that when a narcotic drug or psychotropic substance is found in a public place, the provisions of section 42(2) of the Act must be complied with. However, we find that this question has been specifically considered by the Supreme Court and negatived in Sayar Puri V. State of Rajasthan, (1998) 7 SCC 441..... "

The Division Bench relying on the decision in the case of Sayar Puri (supra) in para 10:(3) observed, " thus, the Supreme Court has specifically held that when an accused is found to be in possession of a narcotic drug or psychotropic substance in a public place, procedure under section 42(2) of the Act is not required to be followed. "

In para-10:(5) the Division Bench observed " In view of the clear proposition of law laid down by the Supreme Court in Sayar Puri (supra), "we are of the opinion that it was not necessary for P.I. Mr. Pathak to comply with the provisions of Sectin 42 (2) of the Act and the appellant is not entitled to acquittal on the ground that the investigating officer had failed to comply with the mandatory provisions of section 42(2) of the Act.

In the case of Sayar Puri (supra) the Apex Court while considering the question of applicability of Section 42(2) and 8 & 18 of the Act and the evidence showing that the accused was found to be in possession of opium while sitting on a bench on a particular public road, also considering the fact of non-preparation of the site plan during investigation when the place of offence was clearly specified; held that, when the place of offence was clearly specified, preparation of site plan was not necessary in course of investigation under section 172 of Cr.P.C. It is pertinent to note that it is not suggested in case of Sayar Puri (supra) as to whether the appointed / empowered officer acted on prior information or not, and the only question over & above compliance with Section 50 of the Act, was, whether it was necessary to prepare site plan when the evidence showed the accused was found to be in possession of opium while sitting on a bench on a particular public road, when the place of offence was specified. In our opinion,

the principle laid down in the case of Sayar Puri (supra) will be of no assistance as the same does not appear to be a case of appointed/ empowered officer acting on prior information, and the question in the present case is whether an appointed/ empowered officer acting on prior information is required to comply with requirements of Section 42(2) of the Act or not, and therefore the decision in Criminal Appeal No. 12 of 2002 in the case of RAGHUBHAI GANDABHAI (supra) is not applicable to the present case.

12. In the case of AHMEDSHARIF ISMAIL CHIKHALIYA Vs. STATE OF GUJARAT, in Criminal Appeal No. 353 of 1994, on 4-11-1998, Police Inspector Pitambardas Virumal Asanani, Valsad City Police Station had received information at about 6.00 p.m. that Ahmedsharif Ismail Chikhaliya, residing at Taiwad Pan-ni-wad at Valsad was illegally possessing charas for selling. Therefore at 21.15 hrs. he called two panchas and with other police officials, Mr. Asanani raided the house of the appellant and was found to possess 28 grams of charas, the same was seized. In para-10 it has been observed by the Division Bench that "now, therefore, it is clear that no where in the evidence, it has been established that the information which Mr. Asnani, PI, received was reduced into writingwhatever, he has stated the reasons for not obtaining warrant for the search. This must not be treated as due compliance of the provisions under Sections 41(2) and 42(1) of the NDPS Act, wherein categorical requirement is to reduce the information in writing. There is no whisper regarding this in the prosecution evidence, giving rise to the only inescapable conclusion that the required mandatory provision for reducing the information in writing was not adhered to, which renders the prosecution bad. In this view of the matter, the prosecution fails on this count alone and, the appeal came to be allowed setting aside the conviction and sentence imposed for the offence under Section 20 (B) (2) of the NDPS Act".

13. Mr. N.D. Gohil, learned APP has placed reliance on the decision in the case of ABDUL SALAM YUSUF SHEIKH Vs. STATE OF GUJARAT, in Criminal Appeal No. 220 of 1999 by Division Bench of this Court. In para-21 it has been observed that, " at this stage, it is required to know as to whether Mr. Jadav was an authorised officer under Section 42(1) of the NDPS Act. To this question our answer is 'NO' because at the relevant point of time, he was a Police Inspector and he being a Gazetted Officer and in view of the notification reproduced hereinabove, he was an empowered officer under Section 41(2) of the

NDPS Act. So, the provisions of Section 42 will not be applicable to Mr. Jadav, as he was an officer of a gazetted rank and was empowered under Section 41(2) of the said Act as per the notification referred to hereinabove..... On making examination of Section 42(2) of the said Act, we find that it is applicable to those officers who are referred to in Section 42(1) of the said Act. We also do not find the analogous provision of Sub section 2 of Section 42 of the said Act in Section 41 of the NDPS Act which is applicable to Mr. Jadav and therefore, Section 42(2) of the said Act is not applicable to Mr. Jadav as he was a gazetted officer empowered with the powers under Section 41(2) of the said Act.....

It is not argued before us that Mr. Chauhan, LCB P.I. was an empowered officer and therefore Section 42(2) of the Act will not be applicable. Since no submissions have been advanced by either side on this point, we do not take in to consideration the decision in the case of Abdul Salam Yusuf Sheikh (supra).

14. In our opinion the observations in para-14 in case of Abdul Rashid Ibrahim Mansuri (supra) makes the position absolutely clear. In our view, Section 43 of the Act will apply to the cases where search & seizure is carried out in a public place without any prior information to the appointed / empowered officer that the offence under the Act has been committed. It may happen that when an appointed / empowered officer is on a petrolling duty and/or abruptly/accidently comes to know or has the reason to believe from personal knowledge or information that an offence punishable under the Act has been committed, then, in that event; or on a surprise check of a vehicle on a highway or on suspicion on railway station, Airport or any other public place search & seizure is required to be carried out, then in such circumstances without waiting for writing down of the information and conveying it to the superior official such appointed / empowered officer can effect search & seizure like the case of Narayanaswamy Ravishankar (supra), because if the officer has to follow the procedure under Section 42 (2) of the Act, then in such cases the person possessing contraband drug or substance may go away/flee by the time requirement of Section 42(2) are complied with. The present one is not a case of that type and therefore, in our opinion the requirement of Section 42 (2) of the Act would be required to be complied with when the appointed/ empowered officer acts on prior information irrespective of whether search and seizure is carried out in a public place, or not. For

these reasons we are of the view that the provisions of Section 42(2) of the Act are attracted in the present case.

15. It has been further submitted by learned advocates appearing for the appellants-convicts that requirements of Sec. 42 (2) of the Act are not complied with in as much as the information received is neither reduced in writing nor conveyed to superior official.

As far as recording of the information received at residence at 2.10 a.m. vide exhibit-27 is concerned, same has been sufficiently established from the evidence of PW-9 PI Chauhan. It is suggested that after PW-9 received information at 2.10 a.m. at his residence, PW-9 comes to the police station and that the information received was noted down vide exhibit. 27 and thereafter Entry No. 14/98 is made in Station Diary vide exhibit-37. Column No. 4 thereof makes it clear that when PW-9 was at his residence on 23-6-1998 at about 2.10 O' clock night information was received that at around 6.00' Clock morning two persons Bhairavji Manaji Mali and Babubhai Dalaji Mali are to come near Bhildi railway crossing on Bhildi-Deesa road for giving delivery of opium. Column No.3 suggests that the said information was received at 2.30 a.m. The evidence disclosed that the residential quarter of PW-9 is in the police headquarter at Palanpur. PW-9 P.I. Chauhan has deposed that he received the information at 2.10 p.m. on 23-6-1998 when he was at his residence to the effect that accused no.1 & 2 are to come at 6.00 a.m. for giving delivery of contraband opium. Exhibit-27 suggests the time of 2.30 a.m. and in exhibit-37 Entry No. 14/98 in the Station Diary mentions time of receipt of information at 2.30 a.m. According to PW-4 PSI Chudasma he came to the police station at 3.00 a.m. on receipt of telephonic information from PW-6. That PW-5 has stated that on receipt of intimation from P.I. (LCB) Palanpur on 23-6-1998 he reached police station with PI at 3.00 a.m., that all these makes receipt of information and recording of the same vide exhibit-27 and exhiit-37 highly doubtful.

Thus it is sufficiently established that the information was received at 2.10 a.m. by PW-9 at his residence and the same was reduced into writing on a paper at 2.30 a.m., and Entry exhibit-37 was made in the Station Diary. There is nothing unusual in the timings mentioned in exhibit-27, exhibit-37 and the evidence of PW-9 and PW-4. Thus the information received about the commission of offence under the Act has been reduced into

writing vide exhibit-27 and exhibit -37 as required under sub section exhibit-27 and exhibit -37 as required under sub section 2 of section 42 of the Act.

16. According to PW-4 and PW-6 the information reduced into writing vide exhibit-27 and recorded in the Station Diary vide exhibit-37 was communicated to DSP, Palanpur by sending a report to that effect. PW-4 in cross-examination has stated that a written report was sent to DSP through DSP's control room which is on the upper floor of the office of LCB, Palanpur. It is admitted that he cannot say whether P.I. noted the information received by him or not and also whether the DSP office was communicated the same or not. It is stated that after recording of information in presence of the witnesses arrangements were made for communicating the same, i.e. for sending the same to DSP; that there is inward and outward register maintained in the office of the P.I., LCB. This witness has no idea whether the information sent was recorded in the outward register or not, nor can he say whether the information has reached the DSP office or not. It is suggested from evidence of this witness that, there is inward and outward register maintained in LCB office, Palanpur.

17. PW-5 has stated in his evidence that P.I. after recording the information in the information register and NDPS register, had sent the report to the DSP through the control room. This witness has no idea as to what the control room person did; that the post received in the DSP office is entered/noted in the register which would also contain information about the sender and time of receipt; that the report was got written by P.I. through Writer which is exhibit-27.

18. PW-9 P.I. Chauhan has stated in his evidence that the information was received at 2.10 a.m. when he was at his residence through an informant that Bhairavji Manaji Mali and Babubhai Dalaji Mali are to come in the early morning around 3.00 a.m. for giving delivery of contraband opium, that the said information was reduced into writing at his residence vide exhibit-27 and the copy thereof was sent along with the report to DSP by confidential letter through control. Said report is at exhibit-38. In the cross-examination it has been stated that he reached the office at 3.00 a.m., that the original of exhibit-38 was not obtained from DSP office. It is pertinent to note that Copy Exh.38 does not bear any endorsement or seal of control room of DSP's office to suggest receipt of the original of Exh.38. PW-9 in his evidence further states that the statement of the

person who received the information in DSP's control room was not recorded; that the witness can not say whether the information was received in the DSP office or not. It is stated that control room person can say about the same; that the time is noted as and when the information is received by the DSP office; that if original was obtained the time of receipt of information conveyed would be known; that no attempt was made to obtain the original of exhibit-38. It is denied that exhibit-27 was not communicated vide exhibit-38 to DSP and that exhibit-27 and 38 are subsequently concocted.

Except the say of PW-9 there is no evidence as regards receipt of exhibit-38 in DSP office control room. Had the original of exhibit-38 been obtained from DSP control room, then the same would have suggested the time of receipt of the same in control room of DSP's office, nor the inward register from DSP control room nor outward register from the office of LCB Palanpur, though maintained according to PW-4 comes forth which would suggest sending original of exhibit-38 by office of LCB Palanpur and receipt of the same in DSP office control room. Exhibit-38 is merely a simple copy of the report addressed to DSP, Banaskantha, Palanpur, signed by PW-9, without any outward number of outward register of LCB office, Palanpur. Even the person who received original exhibit-38 in the office of DSP control room has not been examined as witness which would suggest delivery of original exhibit-38 to DSP's control room office. It is pertinent to note that exhibit-38 does not contain time of writing. It would be seen that specific questions have been put to PW-9 as regards communication of the information exhibit-38 and the receipt of the same by DSP office. It will be seen that according to PW-9 the information was sent through one Amrutlal and who was instructed to deliver the report in DSP office control room. Amrutlal is cited as a witness in the chargesheet. Amrutlal is not examined as a witness in this case, though according to PW-9 his statement was recorded. It is pertinent to note that the statement of the person receiving the report in DSP office control room is admittedly not recorded. The original of exhibit-38 is also not obtained and produced in this case. Thus, there is no trust worthy evidence to suggest sending of and/or receipt of original of Exh.38 and, therefore, the same becomes doubtful.

19. In the case of SEDHABHAI @ SHANKARBHAI HINGOLABHAI Vs. STATE OF GUJARAT, in Criminal Appeal No. 1118 of 1996 with Criminal Appeal No. 1119 of 1996 the Division Bench of this Court observed that, "the

prosecution could have led evidence by examining some witness from the office of DCB to prove whether the information was in fact received or not". The fact remains that it is a matter of doubt whether compliance of Section 42(2) is made or not. It may be seen that the investigating agency had the knowledge of the fact that the offence is of a serious nature. The evidence as regards communication of the information to the superior officer under Section 42(2) of the Act would reflect in the manner in which the investigation is carried out. If the original of exhibit-38 was sent by hand delivery then it was necessary to examine Amrutlal from the office of LCB, Palanpur, as witness and if it was sent by post by making entry in the outwards register, then in that case outward register could have been produced to show sending of the same to the office of DSP control room. Evidence also could have been led by saying who had received the information in the DSP office control room, if it was received by hand delivery and also the inward register suggesting receipt of the same in DSP's control room. It is surprising why the investigating agency has not collected the evidence in this regard in course of investigation when the compliance with Section 42 (2) of the Act is mandatory. Having regard to the evidence as discussed above and the mandatory requirement of Section 42 (2) of the Act, we are of the view that the information reduced into writing vide exhibit-27 and in the Station Diary vide exhibit-37 has not been communicated to the superior officer, i.e. DSP, Palanpur as required under Section 42(2) of the Act, and this part of sub section 2 of section 42 remains not complied with in the present case.

20. It is next contended on behalf of the appellants convicts that Section 57 of the Act is not complied with in as much as the report of arrest & seizure under Section 57 of the Act is not sent to the immediate official superior by P.W. PW-9. Section 57 of the Act provides that whenever any person makes any arrest or seizure under this Act, he shall within 48 hours next after said arrest or seizure make a full report of the particulars of such arrest or seizure to its immediate official superior. The evidence of PW-9 suggests that the intimation about registration of the offence was sent to DSP vide wireless message exhiit-41. It is further suggested that the information to DSP was sent vide letter exhibit-44. Thereafter the complaint, panchnama of the arrest, seizure of muddamal etc were handed over to PSO Bhildi police station and offence was registered . The wireless message exhibit-41 suggests that the offence was registered at 11.15 hrs and exhibit-41 was sent at

11.20 a.m. Exhibit-44 intimation under Section 57 was sent on the same day. Thus PW-9 has informed his higher superior official about the incident by wireless exhibit-41 as well as report under Section 57 of the Act on the same day. Nothing substantial has been brought out from the cross examination of PW-9. It is also submitted on behalf of defence that Section 57 is also not complied with in as much as there is no evidence to suggest sending of and receipt of exhibit-44 to and by DSP office, Palanpur. PW-9 in his cross examination has stated that the wireless message would be received by Wireless Operator in the DSP office and would in turn send the same to DSP; that no statement of the Wireless Operator was recorded. This is with regard to wireless message exhibit-41. No question has been put to PW-9 as regards sending of exhibit-44 and receipt of the same in the DSP office.

Thus, it would be seen that the evidence of PW-9 as regards sending of report exhibit-44 under section 57 of the Act has not been challenged, though PW-9 was cross examined at length. Exhibit-45 is the report under Section 58 of the Act to District Magistrate. Questions have been put in general as regards the inward and outward register maintained in the office of LCB, Palanpur to PW-4. All what has been suggested to PW-9 is that the report about joint possession of the contraband opium by the accused was falsely made to DSP. It is true that there no inward register of DSP control room as well outward register LCB Office, Palanpur, is coming forth on record nor any statement of the person who received the original of exhibit-44. In the case of State of Punjab Vs. Baldev Singh (supra), the Apex Court has held that provisions of Section 52 and 57 are by themselves not mandatory. After explaining that these provisions contain certain procedural instructions for strict compliance by the officers, it is ruled that if there is no strict compliance of any of these instructions, that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. What is emphasised in the said decision is that such violation by itself does not invalidate trial or conviction, if otherwise there is sufficient material and, therefore, it has to be shown that such non-compliance has caused prejudice and resulted into miscarriage of justice.

21. In the case of Gurbax Singh V. State of Haryana (2001) 3 SCC 28, Supreme Court on interpretation of the provisions of sections 52 & 57 has held that those

provisions are directory and violation thereof would not ipso facto vitiate the trial or conviction.

In the case of Sajan Abraham V. State of Kerala, (2001) 6 SCC 692, Supreme Court held that sections 52 & 57 are not mandatory and if substantial compliance is made, it would not vitiate the prosecution case. In the present case the appellants have not been able to show that so called non compliance of the provisions of Section 57 has caused prejudice to them and resulted into miscarriage of justice. Therefore, the plea which is based on violation of the provisions of sections 52 & 57 cannot be accepted.

22. It has been submitted by Mr. B.B. Naik, learned advocate for the appellant - original accused No.2 that, according to the prosecution case and the evidence on record accused no.2 was found walking with accused no.1. The cotton bag wherefrom contraband opium has been recovered was held by accused no.1; that is the case of the prosecution and also suggested from the evidence that accused No.1 for some time temporarily handed over the said cotton bag to accused No.2 as accused No.1 wanted to go to answer nature's call and accused No.2 enabled accused No.1 to go for responding nature's call, held the cotton bag for sometime; that the prosecution case and the evidence further is that, after accused No.1 returned, he took back the cotton bag from accused No.2 and accused No.2 handed over the cotton bag to accused No.1. It is further submitted by Mr. Naik that the prosecution case and the evidence at their best cannot establish possession of contraband opium which would amount to conscious possession by accused No.2. It is submitted by Mr. Gohil, Learned APP that since there was prior information suggesting both the accused persons coming together with contraband opium, accused No.2 can be said to be in conscious possession of the contraband opium, and that, accused No.2 has no explanation to offer to question No. 8 and 12 to 14 under Section 313 Cr.P.C.; that the accused could have said whatever he wanted to as regards the possession of the contraband opium but he has not chosen to do so.

23. In exhibit-27 accused No.2 has been specifically named suggesting that he along with accused no.1 was coming from Bhildi railway crossing at about 6.00 a.m. in the morning for delivering opium on Bhildi-Deesa road. The evidence discloses accused no.1 & 2 came walking together and accused no.2 temporarily kept the cotton bag given to him by accused no.1 for some time. The evidence on record also suggest the control of accused no.1 over

contraband opium. Temporarily holding the cotton bag without knowing the contents therein cannot be construed to mean knowledge of the contents in the cotton bag by accused no.2, since there is no evidence to suggest any connection between accused No.1 & 2 . There is no evidence at the same time to suggest dominion of accused no.2 over contraband opium and accused no.2, looking to the state of evidence as pointed out above cannot be said to have the intention of jointly carrying contraband opium in the cotton bag with accused no.1. Keeping the cotton bag temporary for some time cannot bestow knowledge on accused no.2 about the contents of the cotton bag and unless there is knowledge of the contents of cotton bag, accused no.2 cannot be said to have the possession of the contraband opium much less conscious and intelligent possession. It may be that accused No.1 & 2 happened to be on the road at the same time and going in the same direction. It may be seen that there is no evidence to suggest as to whether they were going to the same place and the same person to whom the delivery of the contraband opium was to be given.

It is also not suggested from the evidence as to from which place No.2 was coming, whether they accidently met each other on road, what was the purpose for which accused No.2 was going and to which place. There is also nothing to suggest whether two pedestrian stranger to each other accidentally happened to be on the road and going in the same direction, or they had common interest. There is nothing to suggest from the evidence that accused No.2 was interested in the contraband opium or that he had the knowledge about the contents of the cotton bag. It may also be seen that unless a person has knowledge about the contents of a bag / container one cannot be said to have possessed the same, much less conscious possession which presupposes knowledge about the contents of bag/ container and the possession has to be conscious and intelligent i.e. with full understanding of what he was possessing. Merely walking together on road and holding of cotton bag / container to enable the fellow pedestrian to answer the call of nature and the fellow pedestrian on return taking back the bag/ container cannot be construed to mean knowledge of the contents of the bag / container to the fellow pedestrian, much less conscious and intelligent possession of the contents of the bag. There is absolutely no evidence to suggest that accused No.2 had the knowledge about the contents of the cotton bag which accused No.1 was holding. Thus, there is nothing to show any connection between accused No.1 and 2 and common intention to deal with the contraband opium.

24. Reliance is placed on the decision in the case of ABDUL RASHID Vs. STATE OF BIHAR, AIR 2001 SC. Pg. 2422. In the said case under the Customs Act the appellant Abdul Rashid was found to be in company with co-accused Mohd. Islam from whose possession the offending article was recovered. The High Court was of the opinion that since the investigating officer had the prior information of the fact that the accused persons are coming with the offending article and since the offending article was recovered from the co-accused and the appellant was found at that point of time which is further coroborated by the statement of the co-accused, the conviction is well merited. In light of the facts of the case, the Apex Court held that the conviction based only on fact that the accused was found together with co-accused from whom offending article was recovered and on the basis of confession of co-accused is liable to be set aside. In the instant case there is no statement of co-accused, i.e. accused No.1 implicating accused No.2.

In the case of RUBEN JOSEPH Vs. STATE, 1993 Cr.L.J. pg. 2138, four accused persons committed criminal trespass into the University College compound at about 1.30 p.m. in furtherance of their common intention to sell morphine, a narcotic drug. Kerala High Court set aside the conviction & sentence rendered against 3rd accused finding the 3rd accused not guilty and allowed the appeal observing that the 3rd accused was one among the four accused who was brought to his room on that particular day. Except that he was brought along with three other accused persons, no incriminating circumstance against 3rd accused could be discerned from evidence of PW-1 and when PW-6 seized the articles from the bag the 3rd accused was also present in the room of by itself cannot be a circumstance to infer that the 3rd accused had any common intention to commit any crime or that he was in possession of the narcotic drug.

In para-16 it is observed that " PW-3 said that, he saw accused 2 and 3 sitting in the corridor leading to the Chemistry Laboratory, and MO4 bag was placed in front of them. All that PW-5 said is that the 3rd accused was one among the persons whom they apprehended and as noticed, he said the bag was with the second accused. " In light of these facts Kerala High Court held that the accused sitting with another accused in college corridor and the bag containing narcotic drug was placed in front of them, common intention cannot be attributed to accused no.3 as there is no evidence negative of animus to possess the contraband.

25. In the case of INDER SAIN Vs. STATE OF PUNJAB, AIR 1973, S.C. 2309, the Supreme Court while considering Section 9 of of the Opium Act 1978 held the word "possess" in section 9 (a) connotes conscious possession. Knowledge is an essential ingredient of the offence under section 9 as the word 'possess' connotes possession with knowledge. The legislature has not intended to make mere physical custody without knowledge an instrument of offence. On behalf of the respondent para-16 and 23 have been referred to. In para-16 it is observed ' it is true that prosecution has not adduced any evidence to show that the appellant was knowingly in possession of opium. The appellant took the endorsement of the Railway Receipt from the consignee, and presented it before the parcel clerk and obtained the parcel. There is, strictly speaking, no evidence that the appellant was aware that the parcel contained any contraband substance, much less opium. "

In para-23 it has been observed that " in his statement under Section 342 (old), the appellant totally denied having anything to do with the parcel. He had no case that to his knowledge the parcel contained anything other than apples. He never put forward the case that he bona fide believed that the parcel contained only apples. He was in physical custody of opium. He had no plea that he did not know about it."

In our opinion the principle laid down in Inder Sain (supra) will be of no application to the present case since it is the prosecution case and the evidence also that it was accused No.1 who was holding the bag, except for a shortwhile to enable accused No.1 to answer the nature's call. Recovery of contraband opium is from the cotton bag which accused No.1 held before and at the time of search. There is no evidence that accused No.2 possessed the contraband opium within the meaning of the word 'possess'. Since accused no.2 on evidence did not possess the contraband opium there is no question of his explaining possession under section 313 of Cr.P.C.

26. In the case of ISMAILKHAN AIYUBKHAN PATHAN Vs. State of Gujarat, (2000) 10 SCC pg. 257, while considering provisions of Section 20(b) r/w Section 29 of the NDPS Act, the Apex Court held that the conviction cannot be sustained only on the basis of presence of accused person in a room which was in possession of another (not an accused in the case) and in which room a bag containing narcotic substance was found. No presumption can be drawn from such evidence of narcotic

substance was in possession of the accused. The burden does not lie on the accused person in the room.

In the instant case also the recovery of contraband opium is from accused No.1, according to the prosecution. Accused No.2 has been merely seen walking on the road along with accused No.1 and he held the cotton bag temporarily for some time and accused No.1 took back the cotton bag from accused No.2.

27. In the case of MUNNALAL MATHURA PRASAD & ANR. Vs. STATE OF GUJARAT, XXXVII (1) GLR pg. 162, Division Bench of this High Court while considering Section 20 of the NDPS Act and Section 101 and 102 of the Evidence Act, wherein 4 accused persons were charged with possessing contraband article held that, it is for the prosecution to prove that accused was concerned with the contraband article or dealt with it in any manner. That, there must be "conscious" possession of the contraband article charas recovered from premises raided and accused arrested from the premises, that there is no evidence to show that the premises belonged to the accused or that he was in exclusive occupation of the premises. The Division Bench observed that, if prosecution prove physical custody then burden of proving that accused was not knowingly in possession of the contraband article would be upon the accused.

28. Reliance is placed in the case of SUMARKHAN SIDIQKHAN SINDHI Vs. COLLECTOR OF CUSTOMS (PREVENTIVE), 1999 (1), XI (1) GLR pg. 863. While dealing with section 54 of the NDPS Act, which deals with presumption from possession of illicit articles, the Division Bench held that, presumption can be drawn against the accused where contraband article is recovered from the premises under the control of the accused unless he gives a satisfactory account that he was not in conscious possession of the contraband article.

In para-12 the Division Bench observed "... this act is a special enactment, particularly dealing with cases of Narcotic Drugs and Psychotropic Substances, enacted by the Parliament with a pious object of taking care of public health so as to make stringent provisions of the control and regulation and operation relating to narcotic drugs and psychotropic substances and, therefore, cases in which any narcotic drug or psychotropic substance is recovered from a premises under the control of the person, presumption has to be drawn that it was under his possession unless the person concerned gives a satisfactory account to show that it

was not in his conscious possession."

In the instant case recovery of opium is not from the physical custody of accused No.2 and that the respondent wants this Court to hold that accused No.2 was in joint possession of the contraband opium along with accused No.1. Temporarily handing over of the cotton bag by accused No.1 to accused No.2 under the circumstances as pointed out above cannot suggest the control/dominion of accused no.2 over the contraband opium. Under the circumstances there is no question of drawing presumption as envisaged under section 54 of the Act against accused no.2 in the instance case.

29. In the case of RUBYANA ALIAS SMITA SANJIB BALI Vs. STATE OF MAHARASHTRA, 1996 Cri. L.J. pg. 148, while dealing with the appeal of the appellant convict and setting aside the conviction & sentence under Sec. 20 & 21 of the Act and also under Sectin 25 r/w Section 7 of the Arms Act, 1959, the Division Bench of Bombay High Court in light of the facts held that the appellant was not proved to be in conscious and intelligent possession of the accused, and further held that 'possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object. " While considering Section 313 of the Cri. Procedure Code. Under the circumstances looking to the state of evidence against accused no.2 and the principle laid down in the above referred decisions, we are of the opinion that accused no.2 cannot be said to have possessed contraband opium much less consciously and intelligently.

30. As far as accused no.1 is concerned, the evidence on record disclosed accused No.1 held the cotton bag wherefrom during the search contraband opium weighing 1950 grams was found. PW-2 & 3 panch witnesses to search & seizure panchnama exhibit-18 have not supported the prosecution. PW-1 who is said to have weighed the muddamal after the seizure of muddamal, has not supported the prosecution. Panchnama exhibit-18 has been proved through the evidence of PW-2 since he admitted his signature thereon. PW-2 & 3 both the panchas to panchnama -18 have admitted their signatures on panchnama as well as paper slips exhibit-19 and 20 pasted on the muddamal opium and the sample taken therefrom. PW-4 who has given the complaint exhibit-25 and PW-5 Unarmed Head Constable Abbaskhan Takarmiya who was one of the members

of the raiding party, and PW-9 have deposed to the effect that contraband opium weighing 1950 grams was recovered from the cotton bag which was held by accused No.1 before and during search. The Forensic Science Laboratory (FSL) report exhibit-47 suggests that on chemical examination of sample substance Mark 'A' was opium containing 8.5 % morphine (endyeds). PW-4, 5 and 9 have also deposed that the opium recovered during the search was got weighed from PW-1. We do not find any reason not to accept the deposition of PW-4, 5 and 9 as regards recovery of contraband opium weighing 1950 gram during search & seizure vide panchnama exhibit-18 from the custody of accused No.1. The evidence of PW6, 7 and 8 suggest that along with the complaint and other papers, the opium recovered was handed over to PSO and the same remained with him and was sent to the FSL in sealed condition. It is also suggested that muddamal opium reached FSL with seals intact and does not suggest that after the muddamal opium was delivered to PSO along with complaint exhibit-25, same moved out from the custody of PSO or that the seals were in any manner tampered with. It is also suggested from evidence on record that the muddamal reached the FSL in the same condition and remained as such all through out. The prosecution version as regards recovery of contraband opium from the custody of accused No.1 is established beyond all reasonable doubt by reliable and cogent evidence, as accused No.1 has not explained about his possession of muddamal opium, but that pales into insignificance in view of non compliance with the mandatory requirement of Section 42 (2) of the Act as observed in the earlier part of this judgment.

31. To sum up, it is suggested from the evidence on record that accused No.1 consciously possessed contraband opium weighing 1950 grams, and the same has been recovered vide panchnama exhibit-18 and the substance recovered from accused no.1 was opium within the meaning of NDPS Act containing 8.5 % morphine (endyeds) as per the FSL report exhibit-47. Provisions of section 42 (2) of the Act would be applicable as the search & seizure of accused No. 1 was on prior intimation and the same was reduced into writing vide exhibit-27 and noted in the Station Diary vide exhibit-38, but the second requirement of sub section 2 of section 42 of the Act namely communicating the same to the immediate superior official has not been complied with in as much as exhibit-38 is a simple office copy which does not bear any endorsement from the DSP control room, Palanpur suggesting receipt of the original nor exhibit-38 contain any outward number from outward register of LCB Palanpur, though the evidence discloses that in the LCB Palanpur outward

register is maintained, nor any inward register of DSP control room, Palanpur or any other evidence suggesting the receipt of original of exhibit-38 in the office of DSP control room Palanpur. Thus the requirement of communicating the information reduced into writing to the superior official as required under sub section 2 of section 42 of the Act remains not complied with, since it has to be shown that the information purported to have been sent to the superior official has reached the superior official. Section 57 of the Act though not complied with, in as much as exhibit-44 is only an office copy of the communication purported to have been sent to the office of District Police Superintendent without any outward register number nor any endorsement from the office of the superior official suggesting the receipt of the original of exhibit-44, or any other evidence suggesting the sending and or receipt of the same as deposed by PW-9, since the accused have not been able to show any prejudice to them and thereby, miscarriage of justice for want of compliance with the requirement of section 57 of the Act as the said provision being directory, nothing will turns on the non-compliance of the same. Accused No.2 cannot be said to have consciously and intelligently possessed the contraband opium as he only temporarily held the cotton bag which was later on found to contain contraband opium when the same was held by accused No.1. Holding cotton bag temporarily for some time to enable accused No.1 to respond to the call of nature can not bestow knowledge on accused no.2 about the contents of the cotton bag, as from evidence, accused no.2 cannot be said to have dominion or control over contraband opium nor can he be said to be in joint possession of contraband opium along with accused no.1.

32. Thus, it would be seen that both the appeals are required to be allowed and the conviction and sentence imposed by the trial court quashed and set aside. As far as accused No.1 is concerned mandatory requirement of sub section 2 of section 42 of the Act as observed earlier has not been complied with, whereas accused no.2 besides non-compliance of Section 42(2) of the Act as above, is also not proved to have possessed the contraband opium consciously and intelligently or jointly with accused no.1.

33. In the result both the Criminal Appeals are allowed. The conviction recorded and sentence imposed in Special Case No. 73 of 1998 by the Trial Court is quashed and set aside. Original Accused No.1 Bhairavji Manaji Mali, appellant in Criminal Appeal No. 819 of

2000; and original Accused No.2 Babubhai Dalaji Mali, appellant in Criminal Appeal No. 387 of 1999, be set at liberty forthwith, if not required in any other criminal case or proceedings. Fine paid, if any, by the accused, be refunded.

Dt: -8-2003 [N.G. NANDI, J]

[RAVI R. TRIPATHI, J]

vgn/